NO. 88-1183

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

J. D. WHITE, Warden,

PETITIONER,

VS.

JERE CHATOM,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

OF

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Did the Eleventh Circuit Court of Appeals misconstrue the burden of proof in Strickland v. Washington, 466 U.S. 668 (1984) to require the State to disprove the prejudice prong of the Strickland test and thus place itself in conflict with this Court's Strickland opinion and other circuit's opinions holding the burden is on the habeas petitioner to prove prejudice?

2. Did the Eleventh Circuit Court of Appeals impermissibly substitute its finding of facts for those of the District Court contrary to the clearly erroneous rule and contrary to Amedeo v. Zant, 108 S.Ct. 1771 (1988)?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED----------	i
PARTIES----------	ii
TABLE OF CONTENTS----------	iii
TABLE OF CASES----------	iv
OPINIONS BELOW----------	1
JURISDICTION----------	2
CONSTITUTIONAL PROVISION INVOLVED----------	2
STATEMENT OF THE CASE----------	2
STATEMENT OF THE FACTS----------	6
ARGUMENT----------	8
CONCLUSION----------	23
CERTIFICATE OF SERVICE----------	24

TABLE OF CASES

	PAGE
Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)----------	9
Amedeo v. Zant, 108 S.Ct. 1771 (1988)----	17
Anderson v. City of Bessemer, N.C., 470 U.S. 546, 105 S.Ct. 1504, 84 L.Ed. 2d 518----------	17
Fink v. Lockhart, 823 F.2d 204 (8th Cir. 1987)----------	11
Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988)----------	11
Strickland v. Washington, 466 U.S. 668 (1984)-------	10
Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987)----------	11

OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals, reversing and remanding the denial of Respondent's petition for a writ of habeas corpus is not reported yet but is reproduced as Appendix A.[1]

2. The District Court's opinion denying Petitioner's petition is not reported but is reproduced as Appendix B.

3. The opinions of the State Appellate Courts are reported as Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976), rev'd, Chatom v. State, 348 So.2d 838 (Ala. 1977), affirmed on remand, 348 So.2d 843 (Ala. Cr. App. 1977).

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[1]The Appendix to this petition is separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment of the Eleventh Circuit was rendered October 27, 1988. Petitioner's timely rehearing and rehearing en banc were denied on December 19, 1988. This petition is filed within sixty days of that denial and is thus timely under Rule 20.4 of this Court. Thus, this Court has jurisdiction under 28 U.S.C. §1257(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which requires effective assistance of counsel.

STATEMENT OF THE CASE

Respondent was convicted for killing two law enforcement officers in 1976. On direct appeal, Respondent's conviction was reversed by the Alabama

Court of Criminal Appeals on the ground that the atomic absorption test was erroneously admitted. Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976). The Alabama Supreme Court reversed the Court of Criminal Appeals, 348 So.2d 838 (Ala. 1977), holding that the test was admissible as a matter of state law. On remand the Court of Criminal Appeals affirmed Respondent's conviction. A subsequent coram nobis petition was denied and affirmed on appeal.

On December 14, 1981, Respondent filed a 28 U.S.C. §2254 petition. He raised three grounds including a claim that his trial counsel was ineffective in connection with the handling of the atomic absorption test. (R1-1-3)

Ultimately the case was submitted to Magistrate Sims on the pleadings and the state court record.

On January 23, 1985, Magistrate Sims issued a recommendation that the petition be denied. (R1-34-22).

Thereafter, through new counsel Honorable Wanda J. Cochran (R1-39-1), an amended petition was filed (R1-46-1) raising three additional grounds: (1) that the admission of the atomic absorption test rendered Petitioner's trial fundamentally unfair; (2) that the prosecutor's failure to disclose the results of the test violated the trial court's disclosure order and (3) that allowing evidence implicating Petitioner in the death of Wilson rendered the trial fundamentally unfair. (R1-46-1-2). The Petitioner asserted that issues two and three were barred from review by procedural default under Wainwright v. Sykes, 433 U.S. 72 (1972). (R1-51-1-20). Magistrate Sims recommended that the amended petition also be denied. (R2-66-1-4).

On August 31, 1987, Judge Cox entered an opinion and order dismissing the claims raised in the original petition on the merits. (R2-80-7). Finally, on November 20, 1987 Judge Cox ruled that the claims raised in the amended petition were"procedurally barred" (R2-87-1) and dismissed the remaining claims. He entered a judgment dismissing all the claims on the merits. (R2-88-1).

On October 27, 1988, a panel of the Eleventh Circuit reversed the District Court's judgment and held that counsel's performance was deficient and Petitioner was prejudiced by the deficiency under Strickland v. Washington, 466 U.S. 668 (1984). Rehearing and a suggestion for rehearing en banc were denied on December 19, 1988.

STATEMENT OF THE FACTS

The facts relating to the predicate laid and trial counsel's cross-examination of McDuffie and examination of Sennett are fully set out in the slip opinion and need not be repeated here. See Appendix A. A thorough summary of all the evidence appears in Chatom v. State, 348 So.2d 828 So.2d 838 (Ala. Cr. App. 1976), rev'd, 348 So.2d 838 (Ala.), aff'd on remand, 348 So.2d 843 (Ala. Cr. App. 1977).

The Magistrate found and the District Court adopted the following facts from the coram nobis hearing relating to counsel's performance at trial. (R1-34-14).

> The trial judge in his coram nobis decision found as a fact that "Mr. Alonzo filed several pretrial motions, conducted extensive jury voir dire in a motion

for change of venue which was more than sufficient to comply with the appropriate procedures regarding grounds for change of venue ... submitting numerous written requested jury charges, and in general conducted a thorough, zealous, and skillful representation of Petitioner."

The trial court further found that "Mr. Alonzo had been practicing criminal law in this Circuit since 1963. He has tried, literally hundreds of felony jury trials. He was in fact appointed to represent Petitioner because the Court wished to ensure that Petitioner would receive the highest quality representation in what were certainly very serious cases." The coram nobis court also noted that Petitioner's appellate counsel, who qualified as an expert, gave his opinion based on review of the trial transcript that Mr. Alonzo rendered excellent representation to Petitioner. The Magistrate has read the entire state court record and the findings of pure historical fact regarding Mr. Alonzo's efforts set out in the coram nobis court's opinion are supported by the record.

> Additionally, the mixed findings/conclusions regarding the quality of counsel's performance at the trial of the case are supported by the record. Additionally, the mixed findings/conclusions regarding the quality of counsel's performance at the trial of the case are supported by the record. Counsel made a thorough and diligent effort to cross-examine witnesses, to raise and highlight the uncertainty regarding Petitioner's participation in the shooting, and to make appropriate evidentiary objections in general.

Based on the above facts, the District Court found counsel's performance was not deficient under Strickland.

ARGUMENT

The Petitioner asserts that the Eleventh Circuit has applied the wrong standard of prejudice when it wrote, "Due to the general verdicts rendered by the jury which may have convicted Chatom

one of two different theories of liability, this court cannot say that evidence of the atomic absorption test did not have a prejudicial affect upon the jury's verdict." (App. A at emphasis added). This language implies that the burden was on the Petitioner to prove that the evidence did not have an impact when the correct burden is on the Respondent to prove by a preponderance of the evidence that the evidence did have an impact. The correct standard was stated in Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) wherein the Eleventh Circuit wrote:[2]

> The question, then, is whether Aldrich has shown

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[2]Aldrich is but one of many cases that the Eleventh Circuit has stated that the burden is on the Petitioner to show prejudice. See also: Harich v. Wainwright, 844 F.2d 1468 (11th Cir. 1988) (en banc); McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985) (en banc), among others.

> the prejudice that is required to obtain relief for ineffective assistance of counsel. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at ___, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. Aldrich must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome." Id. at ___, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

(emphasis added). Clearly, the proper standard required to be found by the Eleventh Circuit is a finding of prejudice not merely that there has been no negation of prejudice. Aldrich merely follows the dictates of this Court's opinion in Strickland v. Washington, 466 U.S. 668, wherein this Court clearly placed the burden of proving prejudice on the defendant.

"... [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the error." id., at 696-697 (emphasis added). The opinion issued in this case places the Eleventh Circuit in conflict with the Seventh Circuit case of Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988) wherein that court held that the burden of proof is on the habeas petitioner to prove both prongs of Strickland, citing, Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987) and the Eighth Circuit case of Fink v. Lockhart, 823 F.2d 204 (8th Cir. 1987), also holding that the burden is on the habeas petitioner to satisfy both prongs of Strickland. Indeed all circuits follow Strickland.

The Eleventh Circuit's opinion required the State to negate prejudice and since there were two verdict theories the State was required to do so under both theories. This is error because the burden of proof under Strickland is on the Petitioner. Even if Respondent could have shown prejudice as to one of the possible theories of liabilities this is not enough. Respondent failed to prove prejudice under both possible verdicts which means that the Respondent should not have prevailed. The panel's decision is also wrong because it failed to consider all of the evidence and instead focused the prejudice inquiry narrowly on one piece of evidence.

For example, under the accomplice theory of liability the admission of the test result could not possibly have resulted in a different outcome because

the State did not have to prove who actually fired the fatal shots. Thus, the test results (proof that Wilson did not recently fire a gun) could not possibly undermine confidence in the jury's verdict. Respondent has not proven that the jury did not convict him under this theory. Therefore, he has failed to carry his burden of proving prejudice.

Under the trigger-man theory, there was other credible evidence from which the jury could conclude Chatom fired the fatal shots. That evidence was the autopsy report which showed Wilson died of a contact gun shot wound. The only person who could have conceivably fired that shot was Chatom since other evidence tended to prove that the shot was not self-inflicted. This evidence along with the other evidence leads inexorably to the

conclusion that Chatom killed the two deputies. More importantly for the present purposes, it demonstrates the lack of prejudice from the admission of the test results because the outcome of the trial even under this theory would have been the same when all the evidence before the jury is considered.

The proper prejudice analysis required the panel to consider "The governing legal standard ...." "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonably doubt respecting guilt." Strickland, at 466 U.S. 695. Furthermore, the panel had to consider all of the evidence before the jury and must take the "unaffected findings as a given" in making the prejudice determination. id., at 466 U.S. 696.

The Petitioner maintains that the panel has not properly credited the State with all of the "unaffected findings", especially under the accomplice theory of liability. As noted above, under this theory the State did not have to negate the possibility that Wilson killed the deputies. Subtracting out the test results, the remaining evidence is more than sufficient for a jury to find beyond a reasonable doubt that Chatom was an accomplice and therefore guilty of murder under state law. The panel's opinion failed to take into account all of the evidence presented.

Likewise, under the trigger-man theory, if the evidence of the test results are subtracted ut then the evidence is sufficient to support the jury's verdict. Therefore, the Respondent has suffered no prejudice from the admission of the test results.

Instead, it has narrowly found on one item of evidence, i.e., the results of the atomic absorption test. This is clearly not the standard envisioned by Strickland. Had the panel properly considered all of the evidence including Sennett's[2] which destroyed the probative value of the test results, the panel would have necessarily reached a different conclusion.

Because the panel's decision shifted the burden of proving prejudice contrary to the clear mandate of Strickland, the Petitioner requests that this Court grant this petition and reverse the lower court's opinion.

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[2]Sennett testified that even under laboratory conditions the test is only 75% accurate. Other testimony establishes that the samples taken were not under laboratory conditions.

II.

Petitioners maintain that the panel did not abide by the clearly erroneous rule and therefore its opinion is in direct conflict with Amedeo v. Zant, 108 S.Ct. 1771 (1988) and Anderson v. City of Bessemer, N.C., 470 U.S. 546, 105 S.Ct. 1504, 84 L.Ed.2d 518.

In Anderson, this Court summarized the law concerning the clearly erroneous rule in the following language:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

> differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

id., at 105 S.Ct. 1511-1512.

Anderson was applied in Amedeo v. Zant, 108 S.Ct. 1771, 1778 (1988), also a habeas corpus case, wherein the court stated, "The second factual finding rejected by the Court of Appeals is the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge."

This Court further stated:

> Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between then cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S., at 574, 105 S.Ct., at 1512, citing United States v. Yellow Cab, Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct.2182, 72 L.Ed.2d 606 (1982). We reaffirm that stricture today.

id., at 1778.

Based on this Court's statement that the district court's conclusion that there was no deliberate bypass, Petitioners assert that the district court's conclusion, in this case, that

counsel's performance was not deficient under Strickland is also a fact subject to the clearly erroneous rule.[3]

The district court had numerous facts concerning counsel's overall performance before him. (See statement of the facts, supra). He also knew that counsel had not objected to the test results being admitted. Thus, there was two possible views of the evidence. The district court found that counsel's performance was not deficient. The panel's decision does even attempt to state why this conclusion is clearly

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[3]Petitioners are fully aware of the fact that this Court has held that a claim of ineffective assistance of counsel is one of mixed facts and law. However, this standard does not apply once the claim is properly in federal court and the District Court has found certain facts based on the record before him, then the clearly erroneous standard applies.

erroneous, i.e., why it was left with "the definite and firm conviction" that a mistake was made. Instead it substituted its conclusion for the district court's. Amedeo clearly holds that this is impermissible appellate substitution of its fact finding for that of the district court's.

CONCLUSION

This Court should grant this petition and reverse the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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BY-

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CERTIFICATE OF SERVICE

I, P. David Bjurberg, a member of the Bar of the Supreme Court of the United States, do hereby certify that this ____ day of January, 1989, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Wanda J. Cochran
SILVER, VOIR & INGE
Attorneys at Law, P.C.
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I further certify I have served all parties required to be served.

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

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